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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. [redacted] 34

WORCESTER COUNTY TRUST COMPANY, Executor,

Petitioner,

vs.

RAY L. RILEY, Controller of the State of California; W. H. H. GENTRY, Inheritance Tax Attorney of the State of California, and FRANK P. SPROUL, Inheritance Tax Appraiser of the State of California,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

MOTION OF THE STATE OF NEW JERSEY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF AS *AMICUS CURIAE*.

DAVID T. WILENTZ,
Attorney-General of New Jersey,

WILLIAM A. MOORE,
Assistant Attorney-General of New Jersey,
State House, Trenton, New Jersey.

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IN THE

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OCTOBER TERM, 1936. No. 922

WORCESTER COUNTY TRUST COMPANY, Executor,

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On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

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MOTION OF THE STATE OF NEW JERSEY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

COMES Now the State of New Jersey, by its Attorney-General, and moves this Honorable Court for leave to file the annexed brief in this case as *amicus curiae.*

DAVID T. WILENTZ,
Attorney-General of New Jersey,

WILLIAM A. MOORE,
Assistant Attorney-General of New Jersey,
Attorneys for State of New Jersey
as amicus curiae.

IN THE

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BRIEF OF STATE OF NEW JERSEY AS *AMICUS CURIAE*

PRELIMINARY STATEMENT

In a suit now pending in the United States District Court for the Eastern District of Pennsylvania, entitled *Alpin W. Cameron, Executor under the will of Alpin J.*

Cameron, deceased, vs. *Charles J. Margiotti, individually and as Attorney-General of the Commonwealth of Pennsylvania, et als., and David T. Wilentz, individually and as Attorney-General of the State of New Jersey, et als.* (December Term, 1936, No. 9639), the tax-enforcement officers of the Commonwealth of Pennsylvania and of the State of New Jersey are named as respondents in a bill alleged to be a "Bill in the nature of an interpleader," and allegedly brought pursuant to the provisions of the Federal Interpleader Act, as amended January 20, 1936 (Judicial Code sec. 24(26), as amended by Act of Cong., January 20, 1936, c. 13, sec. 1, 49 Stat. 1096). The bill prays, *inter alia*, for:

(a) Temporary restraint;
(b) Judicial determination of the legal domicile of the testator at the time of his death;
(c) A permanent order enjoining those respondents who are officials of the non-domiciliary State from collecting any *resident* estate or inheritance tax;
(d) A determination of the "person" or "persons" entitled to the fund interpleaded, and the amount to which they are entitled; and
(e) An order discharging the complainant from further obligation to any of the respondents.

Special appearances for the purpose of objecting to the jurisdiction of the court, and motions to dismiss the bill and vacate the temporary restraining order entered therein, were filed by the Attorneys-General and their assistants for the Commonwealth of Pennsylvania and the State of New Jersey. Further action on those motions has been suspended, awaiting the outcome of the petition for writ of certiorari in the case *sub judice*.

There is also pending in the United States District Court for the District of New Jersey, a bill for injunction brought by *Edwin C. Nevin, surviving Executor of the will of Wal-*

ter Ross McShea, dec'd, et als., against J. H. Thayer Martin, State Tax Commissioner of the State of New Jersey, et als., to determine: (a) the legal domicile of Walter Ross McShea, deceased; and (b) the State, whether New Jersey or Pennsylvania, which is legally entitled to collect a *resident* inheritance tax. This proceeding is now pending on a motion to dismiss the bill for want of jurisdiction before a three-judge court convened pursuant to section 266 of the Judicial Code (Mar. 3, 1911, c. 231, sec. 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938).

New Jersey's tax claim is approximated in the interpleader bill at $75,000, and the injunction proceeding involves an assessment of $93,614.67.

ARGUMENT

BECAUSE IT SO CLEARLY APPEARS THAT THE CIRCUIT COURT OF APPEALS' RULING THAT THE SUIT IS AGAINST A STATE IS CORRECT, CERTIORARI SHOULD BE DENIED

Because of the Inherent Nature of an Interpleader Suit, it is Certain That a State must be Interpleaded in the Instant Matter if the Relief Prayed for is to be Granted.

In the present suit, the Worcester County Trust Company, as executor of the will of Robert H. Hunt, deceased, is endeavoring by its bill, alleged to be in the nature of an interpleader, to obtain a declaration of domicile of said decedent by a Federal court and a determination of the State to which it is legally liable for *resident* inheritance taxes. In the prosecution of this suit it appears that the following have been accepted as postulates by the parties and the courts below alike:

(1) That a State, because of the Eleventh Amendment, is not subject to suit in the Federal courts by one of its own citizens, or by a citizen of another State, without its consent.

Ex Parte State of New York, No. 1, 256 U. S. 490, 497.

Monaco vs. *Mississippi*, 292 U. S. 313.

(2) That a suit against officers and agents of a State acting wrongfully, i.e., in an *authorized* manner under an *invalid* statute,

Terrace vs. *Thompson*, 263 U. S. 197;
Public Service Co. vs. *Corboy*, 250 U. S. 153;
Cavanaugh vs. *Looney*, 248 U. S. 453;
Ex Parte Young, 209 U. S. 123;
Smyth vs. *Ames*, 169 U. S. 466;

or in an *unauthorized* manner under a *valid* statute,

Sterling vs. *Constantin*, 287 U. S. 378;
Greene vs. *Louisville & Interurban R. Co.*, 244 U. S. 499, 507;
Reagan vs. *Farmers Loan & Trust Co.*, 154 U. S. 362, 390;

is not a suit against the State.

(3) That a suit against officers and agents of a State acting rightfully, i.e., pursuant to authority conferred by a *valid* statute is a suit against the State.

Missouri vs. *Fiske*, 290 U. S. 18, 25, 26.
In re Ayers, 123 U. S. 443, 505.
Ex Parte State of New York, No. 1, *supra* (at p. 500).

(4) Whether a suit is, in fact, against a State, is not to be determined by the mere names of the titular parties, but by the essential nature and effect of the proceeding as it appears from the entire record.

Ex Parte State of New York, No. 1, *supra* (at p. 500).
Hopkins vs. *Clemson College*, 221 U. S. 636, 642.

(5) A State is not a citizen.

City Bank Farmers' Trust Co. vs. *Schnader*, 291 U. S. 24, 29.

State Highway Commission vs. *Utah Construction Co.*, 278 U. S. 194, 199, 200.

And the bill appears to be based upon the premise that the group of taxing officials representing the State of California, *or* the taxing official representing the State of Massachusetts, is acting rightfully, and that the State which it or he represents has a valid claim to some portion of the fund interpleaded.

As observed in the opinion of Judge Brewster (R. 26-37; reported in 14 F. Supp. 754), it is well settled that officers of a State attempting to enforce an unconstitutional statute, or acting in an unconstitutional manner under an admittedly constitutional statute, may be sued in their individual or personal capacities as wrong-doers without involving the State which they purport to represent as a necessary party to the litigation (see particularly R. 32-34). It is equally well settled, as stressed in the majority opinion of the Circuit Court of Appeals (R. 43-57), that if individuals sued as agents and representatives of the State are acting pursuant to a valid statute and in a lawful manner, the State itself is the real party to the suit. The former is maintainable against the individuals without the consent of the State, but not so as to the latter, and any attempt to subject the State to suit by naming its officers and agents, violates the Eleventh Amendment the same as if the suit were instituted directly against the State.

The dissenting opinion of Judge Morton points out that it (R. 58)

> "is inherent in suits in the nature of interpleader, that one claimant is adjudged to have a good claim against the plaintiff, and the other not."

Because this is so, does not the solution of the issue here involved lie in the answer to the simple *quaere,* Is it possible to bring a suit of this nature to a final conclusion, without deciding that one group of officials is acting rightfully? If the answer be—and it would seem to be inevitable—that the suit may not be finally concluded without reaching such a determination, then it must necessarily follow that it cannot be maintained in face of the Eleventh Amendment, because the instant it is determined that one group is acting wrongfully (and, therefore, for themselves) and the other group is acting rightfully (and, therefore, for the State), it is made clear that a State would be impleaded against individuals.

Even the rule that jurisdiction is to be determined by the allegations of the bill and "not by the way the facts turned out, or by a decision on the merits" (*Mosher* vs. *Phoenix,* 287 U. S. 29, 30), would not appear to change the situation in this particular type of suit, since it is clear from the bill, and it is also as clear from the start of the suit as it would be at the end, that at least one of the two groups of State officials must be held to have acted rightfully and, therefore, that the State which it represents must finally be drawn into the litigation.

Even the District Court, in reaching the conclusion that it had jurisdiction, recognized that it could not adjudicate beyond a determination of the legal domicile of the testator at the time of his death. Judge Brewster, in his opinion, says that (R. 37):

> "* * * I do not think the court, in these proceedings, can go so far as to adjudicate the exact amount of the tax due to each State."

This would seem to be a tacit admission that a State must ultimately come into the suit and that when it does the court may act no further.

Because a State is not a "Citizen" and Cannot Make Itself Such by Consenting to be Sued, There is an Absence of Diversity of Citizenship Between the Claimants.

Further, since a State is not a *citizen,* and even its consent to suit does not make it such,

> *State Highway Commission* vs. *Utah Construction Co.,* 278 U. S. 194, 199, 200;
> *Minnesota* vs. *Northern Securities Co.,* 194 U. S. 48, 63;
> *Postal Telegraph Cable Co.* vs. *Alabama,* 155 U. S. 482, 487;

there is lack of diversity of citizenship between the *claimants,* which is indispensable to the maintenance of an interpleader suit under section 24(26) of the Judicial Code. As ruled by this court in *State Highway Commission* vs. *Utah Construction Co., supra* (pp. 199, 200):

> "* * * No consent by the State to submit itself to suit could affect the question of diverse citizenship."

Since this is a statutory proceeding, even the presence of a substantial Federal question would not alter the situation because the act does not confer jurisdiction upon the District Court where a Federal question is involved. It is not essential that there be a Federal question, and the presence of such a question cannot therefore cure the defect arising from the absence of diversity of citizenship between the claimants:

It is not to be understood from what has just been said that there is, in fact, a Federal question present. As observed by the Circuit Court (R. 52), the bill does not allege action by either group of officials under an unconstitutional statute, or the application in an unconstitutional manner of a constitutional statute. There is no claim that the laws of California or Massachusetts are invalid, or that

either or both of the groups has, arbitrarily, and without evidence, determined that the testator's domicile was within their respective States.

The principles governing injunction proceedings brought pursuant to section 266 of the Judicial Code are not controlling here.

It is important to bear in mind that the position of respondents in a suit brought under the Interpleader Act is quite different from that of defendants in an injunction suit brought pursuant to section 266 of the Judicial Code. In the latter there is but a single group of State officials and a single purpose, and that is to enjoin that group from carrying out some alleged unauthorized act, while in the former, there are two groups of officials and there are two purposes, viz., (a) to enjoin the group acting wrongfully; and (b) to determine the tax due to the group, or to put it a little more accurately, due to the State whose officers have been found to have acted rightfully.

The case of *City Bank Farmers' Trust Co.* vs. *Schnader*, 291 U. S. 24, a proceeding in which it was sought to enjoin the taxing officials of the State of Pennsylvania from attempting to collect a non-resident tax on the transfer of tangible personal property physically located within that State, is, therefore, clearly distinguishable from the situation involved in the instant matter. Because the officers of the State of Pennsylvania were held to have acted properly, the bill was dismissed. Had it been determined that they were acting improperly, permanent injunction would have issued against them. In neither instance would it have been necessary to bring the State into the litigation. Not so here, however, because that group of officers which is ultimately determined to be acting properly, or, rather, the State for which they are acting, is entitled to a money decree to the extent of the tax determined to be due to it and that State must, therefore, be brought into the suit.

The presence in this suit of a general appearance and answer by one of the claimants is not a decisive factor.

While it is true in the instant matter that a general appearance was entered and an answer filed on behalf of the State Tax Commissioner of the State of Massachusetts (a condition, incidentally, which is not present in *Cameron* vs. *Margiotti, et als., supra*), it is not believed that that circumstance can alter the answer to the broad question as to whether or not the Federal Interpleader Act, as amended, is unconstitutional if extended to include a proceeding against officers and agents of two or more States, and even if we assume for the sake of argument that this action amounted to a consent to be sued on the part of one of the claimants, still it could not convert the State into a *citizen* for the purpose of meeting the diversity of citizenship requirement of subsec. "(i)" of the Interpleader Act. (See authorities cited, *supra,* p. 8.) This fact was before the Circuit Court of Appeals and there is no intimation to be found in its opinion that it in any way influenced the problem.

CONCLUSION

There is every evidence in the opinion of the Circuit Court of Appeals of an exhaustive study of the problem presented, and in reaching the conclusion that it did, it has applied only those principles which have been well established by the repeated decisions of this court. It is believed that the Circuit Court of Appeals' determination will settle the question for the other circuits where similar suits are pending, and it is respectfully submitted, therefore, that the determination of that court that the instant suit cannot be maintained, because it constitutes a proceeding against a State in violation of the Eleventh Amendment, appears to be so clearly correct that no useful purpose can

be served by prolongation of this litigation, and that the petition for certiorari should, therefore, be denied.

DAVID T. WILENTZ,
Attorney-General of New Jersey,

WILLIAM A. MOORE,
Assistant Attorney-General of New Jersey,
Attorneys for State of New Jersey
as amicus curiae.